In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1144

TIMOTHY J. BREEN, PETITIONER

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 42–53) is reported at 284 F. Supp. 749. The opinions of the court of appeals (Pet. 27–41) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1969. The petition for a writ of certiorari was filed on March 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3))

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prohibits pre-induction judicial review of a I–A delinquency reclassification of a registrant eligible for a II–S deferment as an undergraduate student.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)) provides, in pertinent part:

* * * * *

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of 50 U.S.C. App.], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 456(h)(1)) provides:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of

learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term

"prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

32 C.F.R. 1642.4 provides:

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and

shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

STATEMENT

On January 8, 1968, petitioner, an undergraduate student at the Berklee School of Music in Boston, Massachusetts, with a Selective Service classification of II–S, was declared to be a delinquent for failing to have his Registration Certificate in his personal possession [1] as required by 32 C.F.R. 1617.1 (Pet. 58). On January 9, 1968, he was reclassified I–A by his local board, pursuant to 32 C.F.R. 1642.12 (Pet. 28).[2]

In February 1968, petitioner brought this pre-induction suit to overturn his I–A classification and enjoin his induction into the Armed Forces (Pet. 28–29). The district court dismissed the complaint for lack of jurisdiction by virtue of Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)), which prohibits judicial review "of the classification or processing of any registrant" until after the registrant "has responded

[1] In November 1967 he delivered his certificate to a Boston clergyman in protest against the war in Vietnam (Pet. 28).

[2] 32 C.F.R. 1602.4 defines "delinquent" as a "person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." 32 C.F.R. 1642.4(a) provides that [w]henever a registrant has failed to perform any duty or duties required of him under the selective service law * * * the local board may declare him to be a delinquent." "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. 451 *et seq.*] and all the rules and regulations issued thereunder " (32 C.F.R. 1602.10).

either affirmatively or negatively" to an induction order (see *supra*, p. 2). The court of appeals, relying on this Court's decisions in *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, affirmed the district court's dismissal of petitioner's suit, with one judge dissenting.

ARGUMENT

In seeking certiorari, petitioner relies mainly on the contention that the decision below conflicts squarely with this Court's decision in *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233. There is, however, no such conflict. Indeed, the court below correctly applied *Oestereich*, and its holding is supported by this Court's earlier disposition of the precise issue here involved. *Schiffman* v. *Selective Service Board No. 5*, 391 U.S. 930. Accordingly, there is no warrant for further review.

1. The decision below is not in conflict with the *Oestereich* holding that Section 10(b)(3) of the Military Selective Service Act of 1967, which bars pre-induction judicial review of a local board's I-A classification, does not apply to a ministerial student concededly eligible for an unqualified IV-D exemption from military service under Section 6(g) of the Act. Petitioner never held such an unqualified *exemption*. To the contrary, he enjoyed a II-S student *deferment* granted not under Section 6(g), but under Section 6(h) of the Act.

The distinction just noted takes on special importance because deferments granted under Section 6(h),

as emphasized by the court below, *are* expressly subjected to "such rules and regulations as [the President] may prescribe," including, of course, the delinquency regulations under which petitioner was reclassified from II–S to I–A (Pet. 30). A IV–D exemption from service under Section 6(g), on the other hand, is unqualified, unlimited and *not* made subject by the statute to such rules and regulations. For that reason, Oestereich's reclassification from IV–D to I–A under the delinquency regulations presented a direct clash between the Board's action and the absolute mandate of Section 6(g). That clash was there resolved by this Court's holding that Congress did not, in enacting Section 10(b)(3), intend to preclude pre-induction review of such action by a local board. However, there is no such collision in the instant case, because a Section 6(h) deferment is expressly made subject to the delinquency regulations.

This same distinction, adopted by the court below, was before this Court previously when it considered an earlier attempt, in *Schiffman* v. *Selective Service Board No. 5*, 391 U.S. 930, to analogize a Section 6(h) deferment (there a II–A occupational deferment) to the situation involved in *Oestereich*. This Court's refusal—soon after it granted certiorari in *Oestereich*—to consider or compel pre-induction judicial review in *Schiffman* is additional recognition of the validity of the distinction between a Secton 6(h) *deferment* and a Section 6(g) unqualified *exemption*, insofar as the

availability of pre-induction judicial review is concerned. See also *Boyd* v. *Clark,* 393 U.S. 316. And, as recently as March 10, 1969, in *Kaplysh* v. *Hershey, et al.,* and *Schwartz* v. *Local Board No. 23,* No. 1637 Misc., this Term, the Court denied stays sought to afford registrants claiming deferments pre-induction judicial review. In effect, therefore, the Court again recognized that the *Oestereich* exception to Section 10(b)(3)'s bar against such review applies only to registrants whose explicit statutory exemption has been revoked. Such a situation, the Court concluded in *Oestereich,* would involve "a clear departure by the Board from its statutory mandate" (393 U.S. at 238). Where deferments granted under the less absolute language of Section 6(h) are involved, however, no such departure is presented.

Thus, there is no conflict between *Oestereich* and the decision below. Nor is there any conflict between that decision and the decision of any other court of appeals. To the contrary, all the other courts of appeals which have considered the issue—the Fourth, the Sixth, and the Eighth Circuits—have recently reached the same result and have concluded that the *Oestereich* exception does not allow pre-induction judicial review to a registrant who challenges his reclassification from a deferred—as distinguished from exempt—status to I–A under the delinquency regulations. *Kraus* v. *Selective Service System Local 25,* No. 12,786 (C.A. 4), decided March 13, 1969; *Anderson* v. *Hershey,* No.

18976 (C.A. 6), decided April 11, 1969; *Kolden* v. *Selective Service Local Board No. 4,* No. 19,331 (C.A. 8), decided January 28, 1969, pending on petition for a writ of certiorari, No. 1175, this Term. See also *Wills* v. *United States,* 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908.

2. All of petitioner's other arguments, including those of a constitutional nature, were before this Court in *Oestereich* and in the companion case decided along with it—*Clark* v. *Gabriel,* 393 U.S. 256. At that time, as noted in the opinion below, the constitutional claims there asserted were "rejected *sub silentio* in *Gabriel*" (Pet. 32). And this Court's opinion in *Gabriel* rejects the argument that Section 10(b)(3)'s bar against pre-induction judicial review is unconstitutional. See also *Boyd* v. *Clark,* 393 U.S. 316. Since these contentions have been so recently considered by the Court, at least where presented in the context of a pre-induction suit,[3] they do not support the granting of the petition in the instant case and do not appear to call for extended comment here.

[3] It should be noted that the instant case and those like it are in a different posture, insofar as the claim of punitive reclassification is involved, than cases like *Gutknecht* v. *United States,* No. 1176, this Term, presently pending on petition for a writ of certiorari. Unlike *Gutknecht,* a criminal prosecution, the instant case involves an effort to obtain pre-induction judicial review in the face of Section 10(b)(3), as amended in 1967. It is only if the Court goes beyond the threshold jurisdictional issue here, as it did in *Oestereich,* that petitioner's contentions in this regard are reached.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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